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Constitutional Law - First Amendment - Closures of a Preliminary Hearing - Public Right of Access

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CONSTITUTIONAL LAW—FIRST AMENDMENT—CLOSURE OF A PRELIMINARY HEARING—PUBLIC'S RIGHT OF ACCESS—The Pennsylvania Superior Court has held that a trial court must consider the public's right of access to a preliminary hearing before ordering closure.

In re Petition of the Daily Item, __ Pa. Super. __, 456 A.2d 580 (1983).*

On December 20, 1979, a preliminary hearing was held before a district magistrate to determine whether Robert E. Dock should be tried on criminal homicide charges.¹ The defendant moved through his attorney to exclude the press and the public from the hearing.² This motion was granted, and the magistrate subsequently impounded a stenographic transcript of the proceeding, thus denying members of the press access to the information contained therein.³

A newspaper, the *Daily Item*, then filed a petition in the lower court to show cause why the information sought should not be released to the press.⁴ The lower court filed its opinion denying the *Daily Item* access to the information contained in the stenographic transcript, stating that the newspaper had no constitutional right to this information.⁵ The *Daily Item* then appealed to the Pennsylvania Superior Court,⁶ contending that the court below abused its discretion by denying the newspaper its clear legal right to attend the preliminary hearing or to secure a transcript of the hearing.⁷ The *Daily Item* further contended that the lower court erred in closing an integral portion of the criminal process to the public without first having required the defendant to demonstrate the ex-

* Due to the unavailability of the *Daily Item* opinion in the Pennsylvania Superior Court Reports at this time, citations to this reporter have been omitted.

1. *In re Petition of the Daily Item*, 456 A.2d 580 (1983).

2. *Id.* at 582.

3. 456 A.2d at 581.

4. Brief for Appellant at 1, *Petition of the Daily Item*, 456 A.2d 580 (1983).

5. 456 A.2d at 581. The lower court's rationale was quoted in the superior court opinion:

In these circumstances, it is clear that the hearing before the District Justice to which Petitioner sought admission and for which it requests a transcript was in part a preliminary or prefatory stage of the criminal justice proceedings to which it had no constitutional guarantee of admission, thus no constitutional right to the transcript.

Id.

6. *Id.* at 583.

7. Brief for Appellant at 2, *In re Petition of the Daily Item*, 456 A.2d 580 (1983).

istence of a serious threat to his right to a fair trial.⁸

Judge Brosky, writing for the court,⁹ reversed the lower court's decision. He first noted that although the trial of the criminal case involved had already been concluded, the appeal was not moot if the questions involved were substantial and capable of repetition unless settled.¹⁰ He found that this was a situation likely to recur, and thus addressed the merits of the appeal.¹¹

Judge Brosky rejected the lower court's finding that the public had no right of access to the preliminary proceedings.¹² He noted that although the United States Supreme Court in *Gannett v. DePasquale*¹³ had held that members of the public did not have an independent constitutional right to insist upon access to a pretrial judicial proceeding based upon the sixth or fourteenth amendments,¹⁴ the Court had reserved decision as to whether there was a basis for this right in the first amendment.¹⁵ Judge Brosky observed, however, that the *Gannett* Court had stated that even if such a right existed, it could be outweighed in some circumstances by a defendant's right to a fair trial.¹⁶ Judge Brosky then distinguished the trial court decision reviewed in *Gannett* from the appeal before him, noting that the closure decision in *Gannett* was based on a balancing of the interests involved,¹⁷ while the court below had held that no first amendment rights were implicated because a preliminary hearing was not a trial to which the right of access attached.¹⁸

8. *Id.*

9. Judge McEwen joined in the opinion. Judge Beck filed a concurring opinion.

10. 456 A.2d at 581. *See generally* Colonial Gardens Nursing Home v. Bachman, 473 Pa. 56, 59, 373 A.2d 748, 750 (1977); McKeesport Area School Dist. v. Collins, 55 Pa. Commw. 548, 423 A.2d 1112 (1980).

11. 456 A.2d at 581.

12. *Id.*

13. 443 U.S. 368 (1979).

14. The sixth amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . . ." U.S. CONST. amend. VI. The fourteenth amendment to the United States Constitution provides, in pertinent part: "no state shall . . . deprive any person of life, liberty or property, without due process of law. . . ." U.S. CONST. amend. XIV.

15. 456 A.2d at 581. The first amendment to the United States Constitution provides, in pertinent part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press" U.S. CONST. amend. I.

16. 456 A.2d at 581.

17. *Id.* at 582. *See* 443 U.S. at 393. Judge Brosky also noted that Chief Justice Burger's and Justice Rehnquist's separate concurring opinions stated that no public right of access existed as to pretrial proceedings. 456 A.2d at 581 n.1.

18. 456 A.2d at 581.

The court then rejected the appellee's argument that article one, section eleven of the Pennsylvania Constitution, which provides for open courts,¹⁹ did not apply because a proceeding before a district justice is not a court proceeding.²⁰ The court pointed to a Pennsylvania statute²¹ as justification for holding that a district justice proceeding, when criminal in nature, is to be treated as a court proceeding.²²

The impact of *Commonwealth v. Hayes*²³ was then considered. In *Hayes*, the Pennsylvania Supreme Court held that a pretrial proceeding could not be closed if some other means were available to protect a defendant's right to a fair trial.²⁴ The *Hayes* court reversed a closure order because the facts indicated that a less restrictive alternative was available.²⁵ In this case, however, Judge Brosky noted that it could not be determined from the record if closure was justified.²⁶ He did conclude, however, that the trial court had erred in not considering the public's right of access to this proceeding, and reversed the order.²⁷

Judge Beck filed a concurring opinion stating that she would grant the public and press a limited right of access to a criminal preliminary hearing.²⁸ She stated that such a right would be based on article one, sections eleven²⁹ and seven³⁰ of the Pennsylvania

19. Article one, section eleven of the Pennsylvania Constitution provides:

All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay. Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the legislature may by law direct.

PA. CONST. art. I, § 11.

20. 456 A.2d at 582.

21. 18 Pa. Cons. Stat. Ann. § 103 (Purdon 1982) provides that a district justice, when exercising criminal jurisdiction, sits as a court.

22. 456 A.2d at 582.

23. 489 Pa. 419, 414 A.2d 318 (1980).

24. *Id.* at 437, 414 A.2d at 327.

25. *Id.* In *Hayes*, the proceeding sought to be closed was a pretrial suppression hearing to be held immediately before trial. The *Hayes* court, relying on the rationale of *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979), held that sequestration of the jurors would have protected the defendant's right to a fair trial. 489 Pa. at 437, 414 A.2d at 327.

26. 456 A.2d at 582.

27. *Id.*

28. 456 A.2d at 583 (Beck, J., concurring). Judge Beck noted that the question was one of first impression before the court. *Id.*

29. See *supra* note 19.

30. Article one, section seven of the Pennsylvania Constitution provides, in pertinent part: "The printing press shall be free to every person who may undertake to examine the proceedings of the Legislature or any branch of government, and no law shall ever be made to restrain the right thereof." PA. CONST. art. I, § 7.

Constitution, and the first amendment to the United States Constitution.³¹ Judge Beck noted that both the Pennsylvania and United States Supreme Court had recognized the public's right of access to both criminal trials and pretrial suppression hearings.³² She further noted that although there has not been agreement in Pennsylvania as to the foundation of this right of access,³³ recent federal cases have clarified both the issue and federal constitutional right involved.³⁴ Judge Beck then proceeded to give a four part analysis to show that the public has a right of access to a preliminary hearing.

The first part of Judge Beck's analysis identified the preliminary hearing as an adjudicative criminal proceeding.³⁵ Judge Beck noted its historical background in English criminal jurisprudence, its statutory rather than constitutional origin,³⁶ and its initial codification in Pennsylvania.³⁷ Describing the primary purpose of a preliminary hearing to be prevention of unlawful detention,³⁸ Judge Beck declared that the public as well as the defendant had an interest in this proceeding, the public's interest arising from its fundamental interest in ensuring justice.³⁹

Judge Beck then cited article five, section one of the Pennsylvania Constitution,⁴⁰ section 103 of the Crimes Code,⁴¹ and section 301 of the Judicial Code,⁴² in support of her contention that pre-

31. See *supra* note 15.

32. 456 A.2d at 583 (Beck, J., concurring). See *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982); *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980); *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979); *Commonwealth v. Hayes*, 489 Pa. 419, 414 A.2d 318 (1980), *cert. denied*, 449 U.S. 992 (1980); *Philadelphia Newspapers v. Jerome*, 478 Pa. 484, 387 A.2d 425, (1978), *appeal dismissed*, 443 U.S. 913 (1979).

33. 456 A.2d at 583-84 (Beck, J., concurring).

34. *Id.* at 584 (Beck, J., concurring) (citing *Globe Newspaper*, 457 U.S. 596, and *United States v. Criden*, 675 F.2d 550 (3d Cir. 1982)).

35. 456 A.2d at 584 (Beck, J., concurring).

36. *Id.*

37. *Id.* According to Judge Beck, Pennsylvania's first statutory provision for preliminary hearings was enacted in 1915. Prior to that date, the commonwealth relied on English common law. *Id.* See *Commonwealth v. O'Brien*, 181 Pa. Super. 382, 124 A.2d 666 (1956).

38. 456 A.2d at 584 (Beck, J., concurring).

39. *Id.*

40. Article five, section one of the Pennsylvania Constitution provides as follows: "[t]he judicial power of the Commonwealth shall be vested in a unified judicial system consisting of the Supreme Court, the Superior court, the Commonwealth Court, courts of common pleas, community courts (and) . . . justices of the peace." *Id.*

41. PA. CONS. STAT. ANN. § 301 (Purdon 1981) provides: "the judicial power of the Commonwealth shall be vested in a unified judicial system consisting of . . . (9) District Justices." *Id.*

42. 18 PA. CONS. STAT. § 103 (Purdon 1982). See *supra* note 21.

liminary hearings before district justices are in fact hearings before a court.⁴³ The United States Supreme Court case of *Coleman v. Alabama*⁴⁴ was then cited to show that a preliminary hearing is a stage of the criminal process.⁴⁵ Finally, she noted that there are practical reasons for granting the press access to preliminary hearings, such as the possibility that witnesses to the event might be induced to come forward and testify.⁴⁶

The second part of Judge Beck's analysis focused on the basis for granting the public access to a preliminary criminal proceeding under the Pennsylvania Constitution. She concluded that this right is provided for by article one, sections eleven and seven of the Pennsylvania Constitution.⁴⁷

Judge Beck noted that the word "open" in section eleven was subject to two possible meanings—open to all those suffering a legal injury, and open to the public.⁴⁸ She noted that several lower court opinions,⁴⁹ as well as the concurring opinions in *Commonwealth v. Hayes*,⁵⁰ gave credence to this second meaning of "open."⁵¹ Although the first meaning appeared more often, Judge Beck stated that this did not foreclose a second meaning.⁵² She finally noted that the second meaning of the open court provision was underscored by the court in *Commonwealth ex rel. Paylor v. Cavell*.⁵³

Turning her attention to section seven,⁵⁴ Judge Beck declared that this provision paralleled the first amendment to the United States Constitution.⁵⁵ She stated that the Pennsylvania Supreme Court has recognized that some right to gather news exists, but

43. 456 A.2d at 584-85 (Beck, J., concurring).

44. 399 U.S. 1 (1970). In *Coleman*, the Supreme Court held that a preliminary hearing is a critical stage of a criminal prosecution to which an accused is entitled to appointed counsel. *Id.* at 10.

45. 456 A.2d at 585 (Beck, J., concurring).

46. *Id.*

47. See *supra* notes 19 and 30.

48. 456 A.2d at 586 (Beck, J., concurring).

49. See, e.g. *Commonwealth v. Klinger*, 75 Pa. D. & C.2d 664 (Perry Co. 1976); *Declamp v. Hover*, 57 Berks 17, *aff'd*, 205 Pa. Super. 732, 208 A.2d 479 (1965).

50. 489 Pa. 419, 438, 414 A.2d 318, 328 (1980). Justices Kaufmann, Larsen and Flaherty filed concurring opinions.

51. 456 A.2d at 586 (Beck, J., concurring).

52. *Id.*

53. *Id.* See 185 Pa. Super. 176, 138 A.2d 246 (1958). See also *infra* note 84 and accompanying text.

54. See *supra* note 30.

55. 456 A.2d at 587 (Beck, J., concurring). See also *supra* note 15.

that this right is not absolute.⁵⁶

The third part of Judge Beck's analysis examined the public's right of access to pretrial criminal proceedings under the first amendment to the United States Constitution.⁵⁷ She noted that the United States Supreme Court has held that a first amendment right of press access to a criminal trial does exist.⁵⁸

Judge Beck noted that although the United States Supreme Court had ruled that the sixth amendment to the United States Constitution⁵⁹ did not guarantee access in a pretrial context, the United States Court of Appeals for the Third Circuit had decided in *United States v. Criden, Appeal of Philadelphia Newspapers, Inc.*⁶⁰ that the press was entitled to access to certain pretrial proceedings on due process claims.⁶¹ The judge found the rationale of *Criden* to be persuasive reasoning for applying first amendment rights of access to preliminary hearings.⁶²

Judge Beck finally turned to the problem of balancing the defendant's right to a fair trial⁶³ with the press' right of access when a defendant requests that a preliminary hearing be closed.⁶⁴ She proposed that a defendant must show at least a "serious threat" to his right to a fair trial in order for closure to be proper.⁶⁵ She stated that the threat to defendant's right to a fair trial should be likely and immediate.⁶⁶ Judge Beck also pointed to the American Bar Association's recommendation that a pretrial proceeding only be closed if the information revealed from such a proceeding would create a "clear and present danger" to a defendant's right to a fair trial.⁶⁷

In conclusion, Judge Beck recommended that a three step pro-

56. 456 A.2d at 587 (Beck, J., concurring). See *McMullan v. Wohlegemuth*, 453 Pa. 147, 308 A.2d 888 (1973), *appeal dismissed*, 415 U.S. 970 (1974).

57. 456 A.2d at 587 (Beck, J. concurring).

58. *Id.* See *Globe Newspaper*, 457 U.S. 596; *Richmond Newspapers*, 448 U.S. 555.

59. See *supra* note 15.

60. See 675 F.2d 550 (3d Cir. 1982). In *Criden*, the Court of Appeals for the Third Circuit held that the reason for granting a first amendment right of access to trials in *Richmond Newspapers*, 448 U.S. 555 (1980), applied equally to pretrial criminal proceedings.

61. 456 A.2d at 588 (Beck, J., concurring).

62. *Id.*

63. Judge Beck pointed out that a defendant has a constitutional right to a fair trial under the sixth amendment to the United States Constitution and article one, section nine of the Pennsylvania Constitution. 456 A.2d at 589 (Beck, J., concurring).

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* See American Bar Association Standards Relating to the Administration of Justice: Fair Trial and Free Press, Standard 8-3.2 (2d ed. 1980).

cess be taken before a preliminary hearing is closed. She stated that a judge should consider first whether alternate means exist to protect the defendant's trial rights, then whether the closure is likely to prevent the feared publicity, and finally provide the reasons for the closure decision.⁶⁸

The public's right to attend a criminal trial in the United States is integrally connected to our English common law heritage.⁶⁹ English common law followed an unbroken tradition of conducting criminal trials publicly.⁷⁰ Even the court of Star Chamber, a name linked to secrecy, apparently conducted public trials.⁷¹ This rule of publicity has remained a constant throughout the growth and development of the English common law system.⁷² This feature of the English common law was carried to the American colonies by the English settlers, and appeared in many of the colonial governments' first laws.⁷³ The colonies preserved these open trial provisions in their constitutions when they subsequently became states.⁷⁴ The federal government also enacted a provision to protect this right.⁷⁵

The open trial provision was traditionally viewed as essential to the integrity of the trial.⁷⁶ It discouraged party misconduct and perjury, while giving assurances that the proceedings were being conducted fairly.⁷⁷ This right is, undoubtedly, critical to the accused and is specifically provided to him by both the Pennsylvania and the United States Constitutions.⁷⁸ It is, however, also of extreme importance to the public, serving to provide the appearance of justice by allowing the public to observe the proceeding. Whether this right was specifically or implicitly granted to the public was a question of some debate.⁷⁹

68. 456 A.2d at 590 (Beck, J., concurring).

69. See *In re Oliver*, 333 U.S. 257, 266 (1948).

70. T. SMITH, *DeREPUBLICA ANGLORUM* 101 (Alston ed. 1972).

71. 5 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 156 nn. 5 & 7, 163 (4th ed. 1927).

72. F. POLLOCK, *THE EXPANSION OF THE COMMON LAW* 31-32 (1904).

73. 1 B. SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 129, 140 (1971).

74. *Id.* at 271.

75. U.S. CONST. amend VI.

76. 1 J. BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE* 524 (1827). Bentham notes: "Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account." *Id.*

77. M. HALE, *THE HISTORY OF THE COMMON LAW OF ENGLAND* 343-45 (6th ed. 1820). See also 3 W. BLACKSTONE, *COMMENTARIES* *372-73.

78. See PA. CONST. art. I, §9; U. S. CONST. amend VI.

79. See generally Gannett, 443 U.S. 368; *Richmond Newspapers*, 448 U.S. 555.

Pennsylvania's open court provision⁸⁰ has been found to stand for two separate propositions. First, it clearly means that the Pennsylvania courts are open to all cases involving a recognizable legal injury.⁸¹ Second, this phrase has been held to stand for the proposition that the Pennsylvania courts are open to the public.⁸²

The Pennsylvania Superior Court emphasized this second interpretation in *Commonwealth ex rel. Paylor v. Cavell*.⁸³ The *Cavell* court was faced with the issue of whether the defendant was deprived of his constitutional right to a public trial when the trial judge excluded the public from the trial with the consent of defendant's counsel.⁸⁴ In holding that a defendant could waive the right to a public trial,⁸⁵ the *Cavell* court noted that the public also had a constitutional right to attend a criminal trial.⁸⁶ The *Cavell* court held this right of the public to be separate and distinct from the accused's right to a public trial.⁸⁷ Relying on *Commonwealth v. Trinkle*,⁸⁸ however, the *Cavell* court recognized some limitations on the public's right to attend a criminal trial.⁸⁹

The open court provision of the Pennsylvania Constitution was applied in denying an accused's request to exclude the media from a preliminary hearing in *Commonwealth v. Klinger*.⁹⁰ The *Klinger* court qualified its holding by stating that the evidence of a clear and present danger of uncorrectable prejudice to the defendant's right to a fair trial would have justified an opposite conclusion.⁹¹

In contrast to the Pennsylvania Constitution, the United States

80. For the text of article I, § 11, see *supra* note 19.

81. *Singer v. Sheppard*, 464 Pa. 387, 346 A.2d 897 (1975).

82. See, e.g., *Commonwealth v. Hayes*, 489 Pa. 419, 414 A.2d 318 (1980); *Commonwealth v. Klinger*, 75 Pa. D. & C.2d 664 (Perry Co. 1976).

83. 185 Pa. Super. 176, 138 A.2d 246 (1958).

84. *Id.* at 181, 138 A.2d at 248. In *Cavell*, the defendant was appealing his conviction of robbery with aggravating circumstances. At his trial, the judge had ordered the courtroom cleared with the consent of counsel for both the defendant and the Commonwealth. The defendant later contended that excluding the public from his trial violated his right to a public trial. *Id.*

85. *Id.* at 183, 138 A.2d at 249.

86. *Id.* at 184, 138 A.2d at 250. The *Cavell* court questioned whether the public could have been excluded from the trial if they had sought readmission. The court noted that this issue was not before them. *Id.*

87. *Id.*

88. 279 Pa. 564, 124 A. 191 (1924).

89. 185 Pa. Super. at 182, 138 A.2d at 249. The proposed limitations would operate: (1) to prevent overcrowding; (2) to maintain proper decorum; or (3) to protect minors involved with the case from being subject to scandalous or indecent matters. *Id.*

90. 75 Pa. D. & C.2d 664 (Perry Co. 1976).

91. *Id.* at 665.

Constitution guarantees the accused the right to a speedy and public trial by an impartial jury.⁹² This right was held to be personal to the accused in *Gannett Co. v. DePasquale*.⁹³ The issue before the *Gannett* Court was whether the public had an independent constitutional right of access to a pretrial suppression hearing where the accused, the prosecutor, and the trial judge had agreed to the closure to ensure a fair trial.⁹⁴ The *Gannett* Court held that the public had no constitutional right to attend a criminal trial under the sixth and fourteenth amendments,⁹⁵ but reserved analysis on whether such a right existed under the first and fourteenth amendments.⁹⁶ The Court observed that even if this right existed under the first and fourteenth amendments, it was not violated by excluding the public and press from a pretrial suppression hearing in order to ensure a defendant's right to a fair trial.⁹⁷ The Court noted the danger to a defendant's fair trial rights caused by publicity,⁹⁸ especially publicity of a pretrial suppression hearing.⁹⁹

Closure of pretrial proceedings was found by the *Gannett* Court to be one of the most effective means of ensuring a defendant's right to a fair trial.¹⁰⁰ The *Gannett* Court also observed that neither the public nor the press had the right to attend or report on pretrial proceedings under English common law.¹⁰¹ Similarly, the original New York Field Code of Criminal Procedure provided for the closure of pretrial hearings upon the defendant's request.¹⁰²

The Pennsylvania Supreme Court was faced with a similar closure of a pretrial suppression hearing in *Commonwealth v.*

92. U.S. CONST. amend VI.

93. 443 U.S. 368 (1979).

94. *Id.* at 370-71.

95. *Id.* at 391. Justice Stewart delivered the opinion of the court, which was joined by Chief Justice Burger and Justices Powell, Rehnquist, and Stevens. Chief Justice Burger and Justices Powell and Rehnquist each filed concurring opinions. Justice Blackmun filed an opinion concurring in part and dissenting in part, which was joined by Justices Brennan, White, and Marshall. *See also infra* note 116.

96. *Id.* at 392.

97. *Id.* at 392-93.

98. *Id.* at 378.

99. *Id.*

100. *Id.* at 379.

101. *Id.* at 389 & n.20. *See* E. JENKS, *THE BOOK OF ENGLISH LAW* 75 (6th ed. 1967): "It must, of course, be remembered, that the principle of publicity only applies to the actual trial of a case, not necessarily to the preliminary or prefatory Rule 5.3 (iii) stages of the proceedings" *Id.* *See also* *King v. Fisher*, 2 Camp. 563, 170 Eng. Rep. 1253 (N.P. 1811).

102. *See* 443 U.S. at 390.

Hayes.¹⁰³ The *Hayes* court, while relying heavily on the rationale of *Gannett*, held that closure may not be ordered where there is some other procedural device to protect the defendant's right to a fair trial.¹⁰⁴ The *Hayes* court found the situation before it distinguishable from *Gannett*, where the trial court had adequately considered available alternatives,¹⁰⁵ and *Philadelphia Newspapers, Inc. v. Jerome*,¹⁰⁶ where closure had been necessary to assure a fair trial.¹⁰⁷

Whether the public has an implicit constitutional right to attend a criminal trial under the first and fourteenth amendments was finally answered affirmatively by the United States Supreme Court in *Richmond Newspapers, Inc. v. Virginia*.¹⁰⁸ The *Richmond Newspapers* Court distinguished *Gannett*, noting that the decision there centered around a pretrial suppression hearing, as opposed to an actual trial.¹⁰⁹ The *Richmond Newspapers* Court observed that a concurrence in *Gannett* had specifically emphasized that a suppression of evidence hearing was not a trial.¹¹⁰

Justice Brennan's concurrence in *Richmond Newspapers* further emphasized this distinction.¹¹¹ Justice Brennan noted that the justification for closure of pretrial hearings was the necessity of preventing suppressible evidence from being revealed to the public before the jury pool could become fixed and subject to sequestration.¹¹² In contrast, Justice Brennan observed, this justification was totally lacking where a trial was to be closed.¹¹³

Petition of Daily Item presented a question of first impression

103. 489 Pa. 419, 414 A.2d 318 (1980), *cert. denied*, 449 U.S. 992 (1981).

104. 489 Pa. at 437, 414 A.2d at 327.

105. *Id.* at 424, 414 A.2d at 319-20.

106. 478 Pa. 484, 387 A.2d 425 (1978), *appeal dismissed*, 443 U.S. 913 (1979).

107. 489 Pa. at 428, n.7, 414 A.2d at 322, n.7.

108. 448 U.S. 555 (1980). In *Richmond Newspapers*, the trial court granted the defendant's motion that his murder trial be closed to the public. No objection was made by either the prosecution or two of appellant's reporters who were present in the court room. The trial judge believed that a Virginia statute empowered him to close the trial. *Id.* at 560. See VIRGINIA CODE §19.2-266 (Supp. 1980) which provides in part: "In the trial of all criminal cases, whether the same be felony or misdemeanor cases, the court may, in its discretion, exclude from the trial any persons whose presence would impair the conduct of a fair trial, provided that the right of the accused to a public trial shall not be violated." *Id.* See also *infra* note 120.

109. 448 U.S. at 564.

110. *Id.* See *Gannett*, 443 U.S. at 394 (Burger, C.J., concurring).

111. 448 U.S. at 584 (Brennan, J., concurring).

112. *Id.* at 598 n.25 (Brennan, J., concurring).

113. *Id.*

for the Pennsylvania appellate courts.¹¹⁴ The United States Supreme Court also has not squarely met this issue, but *Gannett* and *Richmond Newspapers* shed some light on this area. *Daily Item* is apparently consistent with the underlying rationale of the latter two cases. The United States Supreme Court in *Richmond* declared that the public has a right of access to attend a criminal trial,¹¹⁵ and five members of the *Gannett* Court¹¹⁶ were unwilling to say that the public had no right of access to a pretrial suppression hearing.¹¹⁷

Neither the public's right to attend a criminal trial nor a preliminary criminal hearing is absolute.¹¹⁸ In both cases, the trial court must determine whether other alternatives besides closure exist which will ensure the defendant's right to a fair trial.¹¹⁹ Precisely what guidelines the court should use are not clear,¹²⁰ but the problems which may possibly be confronted in a pretrial hearing should be carefully assessed so that the defendant is not unfairly prejudiced by erroneous information being conveyed to potential jurors.¹²¹ In view of the public's apparent right of access to these

114. See 456 A.2d at 583.

115. See *Richmond Newspapers*, 448 U.S. at 555.

116. Justice Blackmun's opinion in *Gannett*, where he concurs in part and dissents in part, was joined by Justices Brennan, White, and Marshall. These Justices did not agree that the sixth amendment guarantees were personal to the accused, and thought that such a decision discarded important interests of the press and the public. See 443 U.S. at 407 (Blackmun, J., concurring and dissenting). Justice Powell in his concurrence expressed his view that the first and fourteenth amendments extend at least a limited right of access to the public, even to a pretrial suppression hearing. See 443 U.S. at 397 (Powell, J., concurring). See also *supra* note 95.

117. 443 U.S. 368.

118. See *Gannett*, 443 U.S. 368; *Richmond Newspapers*, 448 U.S. 555.

119. *Id.*

120. In *Richmond Newspaper*, Chief Justice Burger, joined by Justices White and Stevens, found that a criminal trial must be open to the public, absent any overriding interests articulated in the findings. 448 U.S. at 581 & n.18. Justice Brennan, joined by Justice Marshall, found a presumption of openness, finding the Virginia statute in question violative of the first and fourteenth amendments. *Id.* at 598 & n.24 (Brennan, J., concurring). Justice Stewart's concurrence stated that a trial judge should be able to place reasonable restrictions on the press and the public's right to be in the courtroom. *Id.* at 600 (Stewart, J., concurring). Justice Powell, in his concurrence in *Gannett* argued that the public and the press had a first and fourteenth amendment right to be present at a pretrial suppression hearing. 443 U.S. at 397 (Powell, J., concurring). Justice Powell further stated that this right was not absolute, but was limited by the defendant's right to a fair trial and by the needs of government to obtain convictions and to preserve the confidentiality of sensitive information and the identity of informants. *Id.* at 398 (Powell, J., concurring). See also *supra* note 108.

121. 456 A.2d at 589.

proceedings,¹²² however, other less restrictive means of protecting the defendant's right to a fair trial should thus be considered. The lower court's failure to even consider any available alternatives was crucial to the holding in *Daily Item*. A consideration of other possible alternatives in balancing the public's right of access with the defendant's right to a fair trial could have justified the closure.¹²³ Without any record of such an analysis, however, the superior court had no choice but to find that the lower court erred in its holding.

Charles J. Porter

122. See *supra* note 116. See also *Commonwealth v. Contakos*, 499 Pa. 340, 453 A.2d 578 (1982). In *Contakos*, the court cleared the courtroom of all but a few members of the press in light of a purported threat against a witness' life. The appellant was thereafter granted a new trial on the grounds that the abrupt exclusion of the public during the presentation of the Commonwealth's most damaging testimony unduly focused the jury's attention on that testimony. For a recent United States Supreme Court decision upholding this right, see *Press-Enterprise Co. v. Superior Court of California*, 104 S. Ct. 819 (1984) (public right of access extends to voir dire examinations of potential jurors; closure of significant segments thereof without considering alternatives held unconstitutional).

123. See 456 A.2d at 589.